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No. 81-2403

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MARILYN THRELKELD and DANIEL HANKA,
Appellants,

v.

ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872, AFL-CIO,
Appellee,

and

STATE OF MINNESOTA and MINNESOTA PUBLIC EMPLOYMENT RELATIONS BOARD,
Appellees.

On Appeal from the Supreme Court of Minnesota

APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM OF APPELLEE ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872, AFL-CIO

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INTRODUCTION

Pursuant to Rule 16.5 of the Rules of this Court, Appellants Marilyn Threlkeld and Daniel Hanka hereby oppose the motion to dismiss or affirm of Appellee Robbinsdale Federation of Teachers (RFT).

ARGUMENT

The RFT contends that this appeal presents no substantial constitutional question because:

> (i) "[t]he 'members-only benefits' language of the [amended] statute has been construed as including political and ideological activities unrelated to collective bargaining, as well as the cost of direct benefits not available to non-members";[1]
>
> (ii)"[t]he * * * pre-amendment statutory formula complies with the formula set out by this Court", and "[t]he amended statutory formula even more fairly allocates the costs to non-members";[2]
>
> (iii) "[the amended statute] does not contain an irrebutable [*sic*] presumption";[3]
>
> (iv) it is not necessary that "some benefit [to Appellants] must be shown" if a "fair-share" assessment is "to qualify as a fee", rather than be disqualified as a "tax";[4] and
>
> (v) the method of collecting "fair-share fees" meets this Court's standards for procedural due process.[5]

None of these contentions has merit.

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[1] Motion to Dismiss or Affirm of Appellee Robbinsdale Federation of Teachers, Local 872, AFL-CIO (M.) at 3.

[2] *Id.* at 8, 9.

[3] *Id.* at 11.

[4] *Id.* at 13.

[5] *Id.* at 15-17.

First, even if the category "members-only benefits" included "political and ideological activities unrelated to collective bargaining", and even if the category "political and ideological activities unrelated to collective bargaining" included *all* of the RFT's activities not strictly collective-bargaining in nature under this Court's decision in *Abood* v. *Detroit Board of Education*,[6] application of the "fair-share" scheme to Appellants would nevertheless be unconstitutional—because the RFT presented *no evidence whatsoever* that the *unspecified* activities in the "residuum" of its expenditures were *not* "political and ideological activities unrelated to collective bargaining". The RFT identified merely selected activities as "members-only benefits", hiding the rest behind non-descriptive budget-labels, and claiming that this "residuum" was lawfully includable in a "fair-share fee" simply because it said so. By its various "exclusions",[7] the RFT proved only what it was *not* entitled to collect as part of Appellants' "fair-share fees"— it did not establish, logically or constitutionally, that any of the undefined activities in the "residuum" were properly chargeable.

It is ludicrous to argue, as does the RFT, that "[w]hether the RFT proved its case is a factual rather than a legal issue", and therefore "does not contain issues of Constitutional significance".[8] The RFT proved only the "members-only benefits" it deigned to identify. Appellants agree that the costs of those benefits were excluded from their fees. However, from the *factual* proof of selected "members-only benefits", the

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[6] 431 U.S. 209 (1977).

[7] M. at 4 n.1.

[8] *Id.* at 5.

RFT and the Minnesota agencies and courts leaped to the *legal* conclusion that all the RTF's other, unspecified expenditures were collective-bargaining in nature. This conclusion Appellants contest as self-evidently non-rational. And surely, whether a state statute resting upon such a patently illogical premiss can authorize deprivations of liberty and property is a question of substantial constitutional import.

Second, Appellants never argued that the original "fair-share" statute embodied an incorrect formula for calculating fees. For that statute required a showing of *"specific expenses* incurred for *services* rendered by the representative *in relationship to* negotiations and administration of grievance procedures", and then allocated the fees as "a pro rata share" of these proven "expenses".[9] But the RFT and the Minnesota agencies and courts ignored this formula. Instead, they used the invalid "residuum theory", dispensing with any evidence of "specific expenses", "services", or nexus to "negotiations and administration of grievance procedures".

Appellants' complaint—which the RFT never addresses—it that the "residuum theory" is not rational, and therefore cannot allocate costs of collective bargaining at all, let alone "even more fairly" than did the original statutory formula.[10] To say, as does the RFT, that "political and ideological expenses unrelated to collective bargaining must be eliminated" from any "fair-share" assessment, but that "[n]o

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[9] Minn. Stat. § 179.65, subd. 2, *as enacted in* 1973 Session Laws of Minnesota, ch. 635, § 10 (emphasis supplied).

[10] *Pace* M. at 9.

other deduction has yet been required", turns things upside-down.[11] *All* expenditures of public-sector unions are "political and ideological" under *Abood*—and only those *demonstrably collective-bargaining in nature* are constitutionally chargeable to dissenters.[12] Thus, a "fair-share" calculation involves, not *deductions from* a presumably valid amount, but instead *additions to* an initial charge of nothing. The "residuum theory" (unlike the original statute) adopts a deductive, not an additive, approach. Therefore, it is unconstitutional.

Third, the RFT misrepresents what the amended statute allows Appellants to challenge. Appellants certainly can "challenge the fee", as the RFT says.[13] But they are allowed to do this—*without any personal knowledge of the institutional structure and activities of the RFT and its affiliates, and without any discovery of those matters*—only by disproving the costs of the "members-only benefits" the RFT identifies, or by establishing the existence of other such benefits it does not disclose. The statute does not permit them to argue that unidentified expenditures are unrelated to negotiations and grievance-adjustment, or (if so related) are not "services" in a constitutional sense.

The constitutionally relevant matter is the RFT's expenditures on collective bargaining. Yet the amended statute focusses exclusively on the RFT's "members-only benefits", and presumes that all other, unspecified costs are properly chargeable. Appellants cannot chal-

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[11] *Id.* at 8.

[12] *See* 431 U.S. at 227-37 (opinion of Stewart, J.).

[13] M. at 11.

lenge these other, unspecified costs: either practically, because they have no effective means of determining what activities underlay the expenditures; or procedurally, because the Minnesota agencies and courts have ruled that such costs, not defraying "members-only benefits", are includable in the "fair-share fee" by statutory hypothesis. Thus, the amended statute certainly does establish an "irrebuttable presumption", in the sense of "a rule of determining the quantity of evidence requisite for the support of a particular averment which is not permitted to be overcome by any proof that the fact is otherwise".[14] The statute says that proof of "members-only benefits" constitutes "the quantity of evidence requisite" to prove the quite different "averment" that a "fair-share fee" includes only the costs of collective bargaining. And the statute does not permit this inverted, illogical proof "to be overcome".

Fourth, Appellants never argued that a "fair-share fee" is invalid simply because they are not personally "satisfied with the union's actions", or do not subjectively "agree that the union benefits them", as the RFT complains.[15] Rather, Appellants say that a "fair-share" assessment can qualify as a "fee", instead of being disqualified as a "tax", only if it demonstrably relates to benefits employees receive from the RFT's services. Certainly, the RFT, a self-interested private organization, enjoys no better position than an administrative agency of the national government where assessment of "fees" is concerned. Yet no one denies that an agency may charge a "fee" (as opposed

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[14] The definition the RFT explicitly adopts. *Id.*

[15] *Id.* at 13.

to collecting a "tax") "only for 'those activities that are specifically identified as * * * benefitting identifiable recipients' ",[16] and are "indeed beneficial" to them.[17] The agency must demonstrate "a sufficient nexus between the * * * service for which the fee is charged and the individuals who are assessed",[18] and show that "the service * * * *primarily* provide[s] special benefits to an identifiable recipient".[19] Absent an identifiable beneficiary, or "when the identification of the ultimate beneficiary is obscure", the agency may charge no fee at all.[20] For, under such circumstances, the assessment will not satisfy the "value-to-the-recipient" standard which distinguishes a valid "fee" from an unconstitutional "tax".[21] Why no benefit can constitutionally be presumed where a governmental agency acts, but "[w]hen the union's expenditures relate to employee representation, benefit is presumed", the RFT does not explain.[22] Indeed, whether such a presumption is even rational is itself a sub-

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[16] National Cable Television Ass'n, Inc. v. FCC, 554 F.2d 1094, 1104 (D.C. Cir. 1976).

[17] FPC v. New England Power Co., 415 U.S. 345, 351 (1974).

[18] National Cable Television Ass'n, Inc. v. FCC, 554 F.2d 1094, 1104 (D.C. Cir. 1976).

[19] Public Serv. Co. of Colorado v. Andrus, 433 F. Supp. 144, 152 (D. Colo. 1977).

[20] FPC v. New England Power Co., 415 U.S. 345, 349-51 (1974); Mississippi Power & Light Co. v. United States Nuclear Regulatory Comm'n, 601 F.2d 223, 230 (5th Cir. 1979).

[21] *E.g.*, Capital Cities Communications, Inc. v. FCC, 554 F.2d 1135, 1137 (D.C. Cir. 1976).

[22] M. at 13-14.

stantial constitutional question that this Court should address.[23]

Fifth and last, Appellants agree that procedural-due-process analysis involves weighing private against governmental interests, in light of the risk of an erroneous deprivation of property. Here, however, that weighing supports Appellants' challenge. The RFT claims that "the State's interest in authorizing ['fair-share'] deductions prior to a hearing is substantial", in order to "promot[e] the financial stability of exclusive representatives"[24]—implying that large sums of money are involved. Yet, inconsistently, the RFT admits that "[t]he largest of the fair share assessments in this case was approximately $11 per month".[25] How the State can advance a "substantial interest" in immediate seizures of monies that the ultimate recipient thereof concedes are "minimal" in amount defies rational explanation. Bordering on the ridiculous is the RFT's fantasy that "the protestor may leave his employment" to avoid paying fees that amount to "less than one percent of [his] wages"; and mathematically unlikely is its projection that "the fees accrued over a period of time may total a substantial amount", when (as in this case) they involve only about $132 *per* year.[26]

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[23] On the complex legal-economic issues involved, *see, e.g.*, Bradley, "Involuntary Participation in Unionism", *in Labor Unions and Public Policy* (Am. Enterprise Inst. 1958).

[24] M. at 17.

[25] *Id.* at 16, characterizing Appellants' interest as "minimal".

[26] *Id.* at 16-17.

More important is the risk that application of the "residuum theory" by the Minnesota agencies and courts, followed by payment to the RFT of fees released from escrow, no matter what the amount, will result in the immediate and irreparable use of dissenting employees' monies "to finance ideological activities unrelated to collective bargaining."[27] Indeed, because the "residuum theory" is not rational this risk approaches a certainty.

The RFT claims that immediate "fair-share" deductions, followed by a hearing on their validity, is the "only workable procedure".[28] Appellants do not contend that a "pay-as-you-go" system, requiring accurate projections of its expenditures by the representative before any deductions are made, escrowing of all funds under the supervision of a governmental agency until final determination on the merits, clear and convincing evidence of costs of collective-bargaining services by the representative, and return to dissenting employees with adequate interest of all excess collections in the escrow accounts, might not be both "workable" and procedurally adequate. That is a question for this Court to decide when the Minnesota Legislature adopts such a system. Now, however, the "fair-share" statute contains none of these safeguards. Although "workable", from the RFT's perspective, it is procedurally defective from that of the Fourteenth Amendment.

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[27] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 244 (1977) (Stevens, J., concurring); *see* School Comm. v. Greenfield Educ. Ass'n, 385 Mass. 70, —— & n.8, 431 N.E.2d 180, 188-89 & n.8 (1982); *see also* Perry v. City of Fort Wayne, 542 F. Supp. 268, 273-74 (N.D. Ind. 1982).

[28] M. at 17.

CONCLUSION

This Court should deny the RFT's motion to dismiss or affirm, assume jurisdiction, and set this case for full briefing and oral argument.

Respectfully submitted,

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